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In the Supreme Court of the United States

No. 811 — October Term, 1942.

C. W. SANDLIN, *Petitioner,*

vs.

C. E. GRAGG, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Statement.

The petition and supporting brief abound in grievous mis-statements of fact with respect to all the material matters. Respondent claims that petitioner has not made any showing sufficient for issuance of writ of certiorari, and further contends that if any such ground is shown, same rests entirely upon false statements with respect to the record. In support of this challenge respondent first invokes the record, particularly the following named parts thereof:

The Amended Bill upon behalf of the Superior Oil Corporation, hereinafter called "the Superior" (R. 20), was directed against all the defendants, including Sandlin and Gragg. In each of its two causes of action the Superior prayed for relief against each and all of the defendants. The first cause of action was to quiet the Superior's title to that part of its oil and gas mining leasehold acquired for devel-

opment purposes through mesne conveyance from Freelan Pruitt by his guardian. The second cause was to determine by action in the nature of interpleader the ownership of that part of the leasehold working interest then in controversy between the many defendants, including Gragg on the one hand, and Sandlin on the other.

The Superior's Supplemental Complaint (R. 152) showed that it held for the defendants entitled thereto the sum of $10,448.01 which had accrued from that part of the leasehold in controversy between the various defendants. It alleged that it was impossible to determine, without judgment of court, the true owners of this fund, which was tendered into court. At the trial of the Superior's case against all the defendants the interpleader was allowed, and the fund in controversy was paid into the court and same is still held by the court clerk.

The Superior won all of its contentions made in both causes of action. The court's Findings of Fact, Conclusions of Law, and Judgment in favor of the Superior appear in the record at page 167. There was no appeal from said judgment or any part thereof.

Gragg's answer to the complaint, and his cross-petition against Sandlin and all the other defendants, appear in the record commencing at page 40. His Supplemental Cross-Bill against Sandlin and all the other defendants is found in the record at page 43. By these cross-petitions Gragg sought to quiet his title to the properties here involved, against Sandlin and all the other defendants, and to recover all the impounded funds — now held by the court clerk.

The pleadings upon behalf of Sandlin, other than motions, are as follows: Answer (R. 116); Amended Answer (R. 117).

The petition for certiorari appears to be grounded primarily upon the claim that the prior judgment rendered in the state district court was revived in that court while appeal was pending in the Supreme Court of the state. There was no contention at the trial that this judgment was revived. It was in fact nothing but a mere revivor of the action, which was required under the applicable Oklahoma law. It is admitted in various places of the record of the trial court that the revivor referred to was merely a revivor of the action, rather than a revivor of the judgment. As to this please see Record p. 173, on which page it is admitted at least three times that the said revivor was a revivor of the action.

The Findings of Fact, Conclusions of Law, and Judgment in favor of Gragg may be found in the Record commencing at p. 195. All the issues of fact and of law were determined in favor of Gragg and against Sandlin and all the other defendants. For the Circuit Court opinion please see Record p. 243.

The many mis-statements which appear in the petition and supporting brief are the following, and the like:

It is represented in the petition at page 2 and elsewhere that there was a revivor of said district court judgment in that court, whilst in fact there was only a revivor of the action, as shown by the opinion of the Circuit Court of Appeals.

It is erroneously stated that the Circuit Court of Appeals decided important questions of local law in conflict with applicable decisions. There is nothing in the record to support this claim, and in fact the record shows that the decision of the Circuit Court of Appeals was in every respect in accordance with Oklahoma law.

It is erroneously asserted that the Circuit Court of Appeals had decided a question involving jurisdiction of a federal court in direct conflict with applicable decisions of this Court, and has departed from the usual and accepted course of judicial proceeding in seizing a subject-matter within the exclusive jurisdiction of the state court. This statement has no support in the record. In fact, before the filing of the federal court case the state court action referred to by petitioner had come to an end, as was held by the Circuit Court of Appeals.

It is not true, as alleged in the petition, that the Circuit Court of Appeals struck down two judgments of the state court of Oklahoma. In fact nothing of the sort occurred.

It is not true that the Circuit Court of Appeals denied that the Supreme Court of Oklahoma had jurisdiction to review a case from one of the inferior courts of the state.

It is not true, as alleged in the petition, that the Circuit Court of Appeals violated the doctrine announced by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. In fact the doctrine of that case was not involved in any manner whatsoever.

It is not true that the Circuit Court of Appeals disregarded the rule requiring that court to give force and effect to the decisions of the Supreme Court of Oklahoma in construction of Oklahoma statutes.

It is not true that affirmance of said district court case by the state Supreme Court had the effect of adjudicating that the judgment below had not been satisfied as to Gragg. In this connection respondent shows that the affirmance by the Supreme Court related back to the time of the state court judgment and was limited to the matters tried, heard, and determined by the state trial court.

It is not true, as alleged at page 5 of the petition, that an Oklahoma judgment must be revived within one year after the entry of the judgment. Upon this point the petition falsely alleges:

> "* * * Another section [referring to the Oklahoma statutes] provides the revival must be within a year. Thus the statute requires the revival of all unsatisfied judgments within a year, when in no event could the appeal be disposed of within that time."

In truth the applicable Oklahoma statute provides only for the revival of a judgment after it becomes dormant. A judgment does not become dormant until five years after its entry. Okla. Stat. 1941, Title 12, Sec. 735. And there is a provision that issuance of execution within the five years has the effect of keeping the judgment alive for the period of five years from the date of execution.

The statement at page 7 of the petition to the effect that the settlement agreement of July 27, 1933, between Gragg and Pruitt was not called to the Supreme Court's attention, is false. The motion to dismiss Gragg's appeal for the reason that he had fully settled his controversy with Freelan Pruitt was filed in the Supreme Court in ample time for consideration by that court. This motion appears in the record at page 180.

The statement appearing at page 8 of the petition to the effect that the state court directly adjudged that no settlement had been made between Gragg and Pruitt, is untrue. The record upon the point is all to the contrary.

Petitioner's contention that the district court of Seminole County, Oklahoma, had seized the *res* and held same when the action was commenced in the federal court, is entirely contrary to the record, which shows that the state

court proceedings had ended completely prior to the filing of the federal court case.

The statement at page 11 of the petition that the decision of the Circuit Court of Appeals is in conflict with the decisions, statutes and common law of Oklahoma, is entirely erroneous and without any support in the record.

Petitioner's brief recites at p. 15, "It is admitted, however, that the parties did not rely upon this purported settlement." The record furnishes no support for this misstatement of fact. In truth, Gragg always relied upon the settlement agreement and the instruments and actions of the parties in furtherance thereof. In this connection it should be noted that the petitioner, through his agent and attorney-in-fact, G. L. Sandlin, his father, negotiated this settlement agreement and received a very large part of the monies paid for the settlement, all as shown by the opinion of the Circuit Court of Appeals. For this reason and others shown in the record, the respondent pleaded estoppel against the petitioner from asserting the invalidity of the settlement agreement.

The record of Gragg's title and all the papers relating thereto appear in the record. The petitioner has never pleaded or shown any instrument or transaction whatsoever by which he acquired or could acquire any interest in the property here involved. The petitioner attempted by mere parol, contrary to the statutes of fraud, to acquire Gragg's property. Gragg never took so much as one step toward the sale of his interest or the relinquishment of any of his rights under the settlement transaction.

The Jurisdiction of the Federal Court Is Not In Doubt.

The release and satisfaction of the personal judgment against Gragg, together with the execution and delivery of the settlement agreement of July 27, 1933, by which Pruitt conveyed to Gragg the leasehold interest theretofore involved in the litigation between Pruitt and Gragg, constituted the last acts of the state court proceedings between those two parties, and ended those proceedings between these parties to this appeal. The state court lost jurisdiction of the *res* here in controversy between Gragg and Sandlin at the end of the state court litigation, evidenced by the release and satisfaction of judgment. With the subsequent commencement of the Superior case the federal court acquired exclusive jurisdiction.

—*Little* v. *Bowers,* 134 U. S. 547, 33 L. ed. 1016;

County of Dakota v. *Glidden,* 113 U. S. 222, 28 L. ed. 981;

Lambert v. *Hill,* 181 Okl. 225, 73 P. (2d) 124;

Brochier v. *Brochier* (Calif.), 112 P. (2d) 602;

Fluegelman v. *Armstrong* (N. Y.), 110 N. Y. Sup. 967;

Reid v. *Hibbard,* 6 Wis. 173;

Becker Steel Co. v. *Cummings,* 16 Fed. Sup. 601;

Forry v. *Mickle,* 180 Okl. 113, 69 P. (2d) 39;

Union Lithograph Co. v. *Bacon* (Calif.), 175 Pac. 464;

Baune v. *Maryland Casualty Co.* (Minn.), 210 N. W. 396;

15 Corp. Jur. 1142, par. 597;

F. A. Mfg. Co. v. *Hayden* (1st Cir.), 273 Fed. 374;

Bank of Skidmore v. *Bartram* (Mo.), 142 S. W. (2d) 657;

34 Corp. Jur. pp. 724-725.

The rule that "a satisfaction of judgment is the last act and end of the proceeding" is too well settled for further discussion.

It is admitted that the settlement between Gragg and Pruitt did not affect the matters pending upon appeal in the Supreme Court of the state which had not been settled. Amongst those matters not disposed of in the settlement between Gragg and Pruitt was the attorneys' lien claim asserted by Biggers & Criswell against all the defendants in error, including Gragg. Hence Gragg was a proper party in the Supreme Court after his settlement with Pruitt.

In Oklahoma, in case of settlement with transfer of interest in property involved upon appeal, the action in the Supreme Court may continue in the name or names of the original party or parties.

—Title 12, Sec. 235, Okla. Stat. 1941;

Guaranty State Bank v. *Pratt*, 72 Okl. 244, 180 Pac. 376;

Carlisle v. *Nat. Oil & Dev. Co.*, 83 Okl. 217, 201 Pac. 377;

Cushing v. *Newbern*, 75 Okl. 258, 183 Pac. 409;

Gillett v. *Romig*, 17 Okl. 324, 87 Pac. 325;

Potter v. *Reeser Motor Co.*, 160 Okl. 171, 16 P. (2d) 250.

By the terms of the settlement between Pruitt and Gragg, Pruitt conveyed to Gragg all his right, title and interest in and to that part of the leasehold here in controversy, together with Pruitt's rights to the royalties theretofore accrued or accruing from this leasehold interest, and at the same time Pruitt released and gave satisfaction to the personal judgment against Gragg.

Oklahoma Law for Revivor of Actions and for Revivor of Dormant Judgments.

Title 12, Sec. 1078, Okla. Stat. 1941, is as follows:

"If a judgment become dormant it may be revived in the same manner as is prescribed for reviving actions before judgment."

The provisions for revivor of actions are found in Title 12, Secs. 1061 to 1079, Okla. Stat. 1941. Upon showing the death of a litigant, the right to revive the action is absolute. Title 12, Sec. 1069, Okla. Stat. 1941.

In *Kilgore* v. *Yarnell*, 24 Okl. 525, 103 Pac. 698, it was held that proper order for reviving the action must be granted as a matter of right, not being dependent on the discretion of the court.

If application is made to revive a judgment, the judgment debtor must be served by the sheriff in like manner as ordinary summons, unless the judgment debtor waives his right to defend against the proposed revivor of judgment.

There Was No Procedure for Revivor of the Judgment Entered in the State District Court.

The motion for the revivor of the action was the same in the district and Supreme courts. It appears in the record at page 147. This motion recites:

"Comes now Hugh Roff, Special Administrator of the estate of Freelan Pruitt, deceased, and suggests to the court that Freelin Pruitt, plaintiff herein, departed this life on or about May 19, 1934; and that said Hugh Roff has been duly appointed administrator of the estate of said Freeling Pruitt, deceased; with his powers as such special administrator limited to the revival of this cause and also an appeal from this cause now pending in the Supreme Court of the State of Oklahoma;

> and that the said Hugh Roff now moves the court to order that this action, wherein Freelin Pruitt is plaintiff and S. S. Orwig et al are defendants be revived in the name of Hugh Roff as special administrator of Freelin Pruitt, deceased."

The order of revivor in the district court appears in the record commencing at p. 147, and is entitled "Order of Revivor of Action". This order contains a recital purporting to revive the action and the judgment. Considering the order as a whole, in connection with the motion for revivor, it manifestly appears that it was only intended to revive the action. Anyway, a valid order reviving the judgment could not be entered upon a mere motion to revive the action. This is of course fundamental. In Oklahoma there is no provision for the revivor of a judgment until it becomes dormant. Okla. Stat. 1941, Title 12, Sec. 1078. This judgment was not dormant; it was fully alive and in force for the whole period of five years from and after its entry. Okla. Stat. 1941, Title 12, Sec. 735.

Black's Law Dictionary defines revivor of judgment thus:

> "The process of renewing the operative force of a judgment which has remained dormant or unexecuted for so long a time that execution cannot be issued upon it without new process to reanimate it. See *Brier* v. *Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *Havens* v. *Sea Shore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 755."

The express terms of the Oklahoma statute provide only for revivor of dormant judgments.

For the opinion of the Circuit Court of Appeals upon this point see p. 245 of the record. The following excerpt is a sentence, somewhat unfortunately framed, found in the Circuit Court's opinion (R. 249):

> "* * * If the entry of the order of revival of the judgment in the district court, if valid, would have had the effect of barring Gragg from asserting the satisfaction and discharge of the judgment, the state district court was without jurisdiction to enter such order."

The meaning of the sentence is plain, when considered in connection with the court's whole discussion upon the point. The meaning is simply this: The state district court was without jurisdiction to enter an order for the revivor of the judgment; hence if such order was in fact made, it is void.

In referring to the sentence above quoted counsel for Sandlin quotes only part of it, thus:

> "If the entry of order of revival of the judgment in the state court, if valid, would have the effect of barring Gragg from asserting the satisfaction and discharge of the judgment,"

The quotation in the petition, giving only a part of this sentence, is very misleading, without adding the end of the sentence, which sufficiently clarifies the holding of the Circuit Court of Appeals upon the point.

To sum up, there was no motion or application for the revivor of the judgment. Gragg had no notice of any intention to procure an order reviving the judgment. The power of the special administrator who made the motion to revive the action was limited merely to a revivor of the action. The judgment was not dormant, and therefore could not be revived. Thus it is seen that the main point upon which petitioner relies is not supported by the record, and it clearly appears there was no revivor of the judgment, for various reasons.

As To Estoppel.

All the alleged facts which petitioner pleaded for estoppel against Gragg were found and adjudged against petitioner. In fact the record shows that Sandlin is estopped from asserting any of his claims against Gragg.

Effect of Affirmance by the Supreme Court of Oklahoma.

The rule that an appellate court reviews, affirms, modifies or reverses the judgment of the lower court upon the record made below is universal and fundamental.

The validity of the settlement between Gragg and Pruitt was never challenged in the Supreme Court of the state. The decision of that court did not say anything about the settlement. The affirmance merely meant that upon the record made in the trial court and considered as of that time, without regard to subsequent events, the judgment had to be affirmed. The affirmance established the right of the attorneys who claimed a lien for services.

Little v. *Bowers,* 134 U. S. 547, 33 L. ed. 1016, held, where the judgment of the lower court had been satisfied:

> "It is true that the judgment of the court below stands unsatisfied except so far as relates to the costs, which, as before stated, have been paid; but that is immaterial, inasmuch as the controversy upon which that judgment was rendered had been extinguished. That in effect satisfied the judgment. *Neither the affirmance nor the reversal of that judgment would make any difference as regards the controversy brought here by this writ of error.*" (Italics ours.)

And further:

> "In *San Mateo County* v. *Southern Pac. R. Co.,* 116 U. S. 138 (29:589), a writ of error was dismissed where it appeared that the taxes assessed against the

company had been paid to the county after the suit had been commenced, the court resting its judgment upon the reason *that there was no longer an existing cause of action in favor of the county against the railroad company.*" (Italics ours.)

In *County of Dakota* v. *Glidden*, 113 U. S. 222, 28 L. ed. 981, which did not involve any statute, it was said:

> "It is a valid compromise and settlement of a much larger claim, but it includes this judgment necessarily. *It extinguishes the cause of action in this case.* If valid, it is a bar to any prosecution of the suit in the circuit court, though we should reverse this judgment on the record as it stands, for errors which may be found in it. *To examine these errors and reverse the judgment is a fruitless proceeding, because when the plaintiff has secured his object the relation of the parties is unchanged and must stand or fall on the terms of the compromise.*" (Italics ours.)

Respectfully submitted,

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